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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1939.

No. 10[redacted]97

OLGA E. VOELLER ET AL.,
Petitioners,

vs.

THE NEILSTON WAREHOUSE COMPANY ET AL.,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1939.

No. 1035.

OLGA E. VOELLER ET AL.,

Petitioners,

vs.

THE NEILSTON WAREHOUSE COMPANY ET AL.,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

RESPONDENTS' ANSWER TO PETITIONERS' REASONS FOR ALLOWANCE OF WRIT.

The Supreme Court of Ohio, in a six-to-one decision, upheld the constitutional guarantee of due process under the Fourteenth Amendment. In so doing it followed well recognized principles of law. These principles have been repeatedly stated by this Court with consistent uniformity.

Indeed, we know of no authority which is out of harmony with the decision of the majority.

It is significant that there is not a single authority mentioned in the dissenting opinion on the constitutional point.

The Supreme Court of Ohio held (we quote the syllabus):

> "1. The constitutionality of a law may be determined by its operative effect.
>
> 2. A statute, the operative effect of which is to deprive a person of his property without notice and without opportunity to be heard before a competent tribunal, is violative of Section 1 of the 14th Amendment to the federal Constitution.
>
> 3. That part of Section 8623-72, General Code, creating a conclusive presumption in favor of minority stockholders of a corporation who have demanded the fair cash value of their shares constitutes a denial of due process to the majority in failing to afford them an opportunity to repel it, and has an unconstitutional operation."

This is the law decided by the Supreme Court of Ohio in this case. In Ohio the propositions of law decided in any given case are those stated in the syllabus of the case. *Baltimore & Ohio Rd. Co. v. Baillie,* 112 O. S. 567, 148 N. E. 233 (1925). Or, as differently expressed, the points decided are found in the syllabus. *Wrede v. Richardson,* 77 O. S., 182, 82 N. E. 1072 (1907). Matter outside the syllabus is not regarded as decision. *Haas v. State,* 103 O. S. 1, 132 N. E. 158 (1921).

That the constitutionality of a law may be determined by its operative effect is not open to dispute. Indeed it is conceded by opposing counsel at page 16 of the petition. This Court has many times stated this principle.

Minnesota v. Barber, 136 U. S. 313, 34 L. Ed. 455 (1890).

Likewise, the proposition stated in the second branch of the syllabus is well established and is conceded by opposing counsel at page 16 of the petition. It has been recognized and approved over and over again by this Court.

Railroad Com. of Cal. v. Pacific G. & E. Co., 302 U. S. 388, 82 L. Ed. 319 (1938).
Baltimore & Ohio R. Co. v. U. S., 298 U. S. 349, 80 L. Ed. 1209 (1936).
Powell v. Alabama, 287 U. S. 45, 77 L. Ed. 158 (1932).
Coe v. Armour Fertilizer Works, 237 U. S. 413, 59 L. Ed. 1027 (1915).

So also as to the third branch of the syllabus, holding the statutory conclusive presumption to be unconstitutional.

Bailey v. Alabama, 219 U. S. 219, 55 L. Ed. 191 (1911).
Heiner v. Donnan, 285 U. S. 312, 76 L. Ed. 772 (1932).
Schlesinger v. Wisconsin, 270 U. S. 230, 70 L. Ed. 557 (1926).
Manley v. Georgia, 279 U. S. 1, 73 L. Ed. 575 (1929).
Western & Atlantic Railroad v. Henderson, 279 U. S. 639, 73 L. Ed. 884 (1929).

Other principles of law *discussed*, but not decided, in the opinion relate only to local law. Opposing counsel concede this in paragraph (11) on page 22 of the petition. This is so principally because the statutory provision in question is found in no other state excepting Rhode Island, which copied this provision from the Ohio Act in 1932. It has never been approved by the National Conference of Commissioners on Uniform Laws nor has it been included as a part of the Uniform Corporation Act. Moreover, the factual situation here is singularly unique because minority shareholders can, under §8623-72, and almost invariably do, bring actions within the time limit prescribed by the

section (six months) to have the fair cash value of their shares determined in a perfectly constitutional manner. The dissenters here, having demanded exorbitant amounts (four times as much as their pro rata distributive shares, i. e., $100 per share as against $25 per share) sought by the aid of the conclusive presumption to preclude inquiry into the value of their shares and thereby to obtain approximately $100 per share, which would have resulted in other shareholders receiving only about $13 per share.

It is clear, therefore, that there are no special and important reasons for granting a writ in this case. Nor can it be said that the Supreme Court of Ohio (a) has decided a federal question of substance not heretofore decided by this Court, or (b) has decided a federal question of substance in a way probably not in accord with the applicable decisions of this Court.

It should be added that other principles of law *discussed* in the majority opinion, involving non-federal questions, are amply supported by authority.

The statements at pages 17 and 18 of the petition as to the "redress" of the minority shareholders are without merit because, as stated above, such minority shareholders have the right, under §8623-72 G. C., to file actions, when their demands are refused, to have the fair cash value of their shares determined in the manner provided by the statute. The decision below has not altered or impaired this right.

In stating that §8623-72 G. C. is separate and distinct from §8623-65 G. C., the Supreme Court of Ohio was merely *construing* the statutes—a matter with which this Court is not concerned. *Neblett v. Carpenter*, 305 U. S. 297, 83 L. Ed. 182 (1938). Such *construction* is in no way related to the constitutional question here involved.

Of course, neither American Telephone & Telegraph Company, United States Steel Corporation, nor General Motors Corporation, nor any other corporation not organized under the laws of Ohio, are remotely affected by this decision for the simple reason that the states of their incorporation have no similar statutory conclusive presumptions. As to Proctor & Gamble Company, an Ohio corporation, the rights of dissenting shareholders, as pointed out above, are still adequately protected under §8623-72 G. C. and the statement that they are "without remedy" or are denied "redress" is clearly erroneous. Such shareholders need only make their demands and, if such demands are refused and negotiation fails, they may file actions to have the fair cash value of their shares determined and paid.

From what has been said it must be apparent that the application of the constitutional principles here involved to the facts of this case cannot be a precedent for other states because, excepting Rhode Island, they have no similar statutory provision.

It is, of course, well settled that a denial of a petition for certiorari by this Court does not, as suggested by opposing counsel at page 20 of the petition, import an expression of opinion upon the merits of a case.

U. S. v. Carver, 260 U. S. 482, 67 L. Ed. 361 (1923).

ANSWER TO PETITIONERS' BRIEF.

The petitioners' brief is devoted almost exclusively to a discussion of the *construction* of the Ohio statutes and of general principles of local law with which this Court is not here concerned. *Neblett v. Carpenter, supra.*

Certainly the discussion relative to possible conflicts between decisions of inferior courts of Ohio is of no moment here. If it were, it could be clearly shown that no such conflict exists.

There is nothing in *Dodge v. Woolsey*, 18 How. 331, 15 L. Ed. 401 (1856), which has any bearing on the constitutional point. Moreover, the principle for which this case is cited relates to local or non-federal law. But most important, the court below, in the instant case, discussed this point in connection with the *construction* of §8623-72 G. C., Transcript of Record, p. 109.

Nowhere is it pointed out in the petitioners' brief that the Supreme Court of Ohio has decided a federal question of substance not heretofore decided by this Court or not in accord with the applicable decisions of this Court. The nearest approach is on page 37 of petitioners' brief under the heading "ESTOPPEL BY ACCEPTING BENEFITS." The subject of estoppel, however, is not a federal question and moreover the whole argument of estoppel is based upon the contention that §8623-65 and §8623-72 G. C. are one and the same and should be so *construed*. The Supreme Court of Ohio, however, has *construed* these Ohio statutes differently and accordingly the whole argument of estoppel fails. Hence, it cannot be said that the decisions of this Court, cited at the bottom of page 37 of petitioners' brief, are not in accord with the decision of the Supreme Court of Ohio.

The case of *Orient Insurance Co. v. Daggs*, 172 U. S. 557, 43 L. Ed. 552 (1899), is not applicable. In the opinion it is expressly stated:

> "The cases cited by plaintiff in error, which hold that the legislature may give the effect of prima facie proof to certain acts, but not conclusive proof, do not apply."

That case merely involved the right of the legislature to restrict contractual provisions in fire insurance policies.

Manley v. Georgia, supra, referred to at page 46 of the petitioners' brief, is clearly in accord with the decision of the Supreme Court of Ohio. Likewise, the cases of *Western & Atlantic Railway v. Henderson, supra, Schlesinger v. Wisconsin, supra,* and *Heiner v. Donnan, supra,* are not only in accord with, but fully support, the decision of the Supreme Court of Ohio. Opposing counsel are in error in stating, at page 47, that the Supreme Court of Ohio "indulged in no discussion whatever as to whether or not Section 8623-72 affords a fair opportunity to repel the presumption." For such discussion see Transcript of Record, pp. 110 et seq.

It is respectfully submitted that the petition should be denied.

Respectfully submitted,

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